

BILL LOCKYER, Attorney General
of the State of California
RICHARD D. MARINO, State Bar No. 90471
Deputy Attorney General
California Department of Justice
300 So. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-8644
Facsimile: (213) 897-9395
E-mail: Richard.Marino@doj.ca.gov

Attorneys for Complainant

**BEFORE THE
PHYSICAL THERAPY BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues Against:

Case No. 1D 2005 64225

SAMUEL MIESKE
500 Ximeno Avenue, #224
Long Beach, California 90814

STATEMENT OF ISSUES

Applicant/Respondent.

Complainant alleges:

PARTIES

1. Steven K. Hartzell (Complainant) brings this Statement of Issues solely in his official capacity as the Executive Officer of the Physical Therapy Board of California (Board).

2. On or about March 12, 2005, the Board received an application for a Physical Therapist License from Samuel Mieske (Respondent). On or about March 9, 2005, Respondent certified under penalty of perjury to the truthfulness of all statements, answers, and representations in the application. The Board denied the application for an unrestricted license and issued an Initial Probationary License on September 29, 2005.

JURISDICTION

3. This Statement of Issues is brought before the Board under the authority of the following laws. All section references are to the Business and Professions Code unless

1 otherwise indicated.

2 4. Section 2660.2 of the Code provides:

3 “(a) The board may refuse a license to any applicant guilty of
4 unprofessional conduct or sexual activity referred to in Section 2660.1. The board may,
5 in its sole discretion, issue a probationary license to any applicant for a license who is
6 guilty of unprofessional conduct but who has met all other requirements for licensure.
7 The board may issue the license subject to any terms or conditions not contrary to public
8 policy, including, but not limited to, the following:

9 “(1) Medical or psychiatric evaluation.

10 “(2) Continuing medical or psychiatric treatment.

11 “(3) Restriction of the type or circumstances of practice.

12 “(4) Continuing participation in a board-approved rehabilitation program.

13 “(5) Abstention from the use of alcohol or drugs.

14 “(6) Random fluid testing for alcohol or drugs.

15 “(7) Compliance with laws and regulations governing the practice of
16 physical therapy.

17 “(b) The applicant shall have the right to appeal the denial, or the issuance
18 with terms and conditions, of any license in accordance with Chapter 5 (commencing
19 with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the
20 board shall have all the powers granted therein. The action shall be final, except that the
21 propriety of the action is subject to review by the superior court pursuant to Section
22 1094.5 of the Code of Civil Procedure.

23 5. Section 2609 of the Code provides:

24 “The board shall issue, suspend, and revoke licenses and approvals to
25 practice physical therapy as provided in this chapter.

26 6. Section 2660 of the Code provides:

27 “The board may, after the conduct of appropriate proceedings under the
28 Administrative Procedure Act, suspend for not more than 12 months, or revoke, or

1 impose probationary conditions upon any license, certificate, or approval issued under
2 this chapter for unprofessional conduct that includes, but is not limited to, one or any
3 combination of the following causes:

4 “ . . .

5 “(d) Conviction of a crime which substantially relates to the
6 qualifications, functions, or duties of a physical therapist or physical therapy assistant.
7 The record of conviction or a certified copy thereof shall be conclusive evidence of that
8 conviction.

9 “ . . .

10 “(f) Habitual intemperance.

11 “ . . . ”

12 7. Section 2661.5 of the Code states:

13 “(a) In any order issued in resolution of a disciplinary proceeding before
14 the board, the board may request the administrative law judge to direct any licensee found
15 guilty of unprofessional conduct to pay to the board a sum not to exceed the actual and
16 reasonable costs of the investigation and prosecution of the case.

17 “(b) The costs to be assessed shall be fixed by the administrative law
18 judge and shall not in any event be increased by the board. When the board does not
19 adopt a proposed decision and remands the case to an administrative law judge, the
20 administrative law judge shall not increase the amount of the assessed costs specified in
21 the proposed decision.

22 “(c) When the payment directed in an order for payment of costs is not
23 made by the licensee, the board may enforce the order of payment by bringing an action
24 in any appropriate court. This right of enforcement shall be in addition to any other rights
25 the board may have as to any licensee directed to pay costs.

26 “(d) In any judicial action for the recovery of costs, proof of the board's
27 decision shall be conclusive proof of the validity of the order of payment and the terms
28 for payment.

1 “(e) (1) Except as provided in paragraph (2), the board shall not renew or
2 reinstate the license or approval of any person who has failed to pay all of the costs
3 ordered under this section.

4 “(2) Notwithstanding paragraph (1), the board may, in its discretion,
5 conditionally renew or reinstate for a maximum of one year the license or approval of any
6 person who demonstrates financial hardship and who enters into a formal agreement with
7 the board to reimburse the board within that one year period for those unpaid costs.

8 “(f) All costs recovered under this section shall be deposited in the
9 Physical Therapy Fund as a reimbursement in either the fiscal year in which the costs are
10 actually recovered or the previous fiscal year, as the board may direct.

11 8. Section 2661 of the Code provides:

12 “A plea or verdict of guilty or a conviction following a plea of nolo
13 contendere made to a charge of a felony or of any offense which substantially relates to
14 the qualifications, functions, or duties of a physical therapist is deemed to be a conviction
15 within the meaning of this article. The board may order the license suspended or
16 revoked, or may decline to issue a license, when the time for appeal has elapsed, or the
17 judgement of conviction has been affirmed on appeal or when an order granting probation
18 is made suspending the imposition of sentence, irrespective of a subsequent order under
19 Section 1203.4 of the Penal Code allowing that person to withdraw his or her plea of
20 guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing
21 the accusation, information, or indictment.

22 9. Section 2666 of the Code provides:

23 “(a) Criteria for acceptance into the diversion program shall include all of
24 the following:

25 “(1) The applicant shall be licensed as a physical therapist or approved as
26 a physical therapist assistant by the board and shall be a resident of California.

27 “(2) The applicant shall be found to abuse dangerous drugs or alcoholic
28 beverages in a manner which may affect his or her ability to practice physical therapy

1 safely or competently.

2 “(3) The applicant shall have voluntarily requested admission to the
3 program or shall be accepted into the program in accordance with terms and conditions
4 resulting from a disciplinary action.

5 “(4) The applicant shall agree to undertake any medical or psychiatric
6 examination ordered to evaluate the applicant for participation in the program.

7 “(5) The applicant shall cooperate with the program by providing medical
8 information, disclosure authorizations, and releases of liability as may be necessary for
9 participation in the program.

10 “(6) The applicant shall agree in writing to cooperate with all elements of
11 the treatment program designed for him or her. Any applicant may be denied
12 participation in the program if the board, its designee, or a diversion evaluation
13 committee, as the case may be, determines that the applicant will not substantially benefit
14 from participation in the program or that the applicant's participation in the program
15 creates too great a risk to the public health, safety, or welfare.

16 “(b) A participant may be terminated from the program for any of the
17 following reasons:

18 “(1) The participant has successfully completed the treatment program.

19 “(2) The participant has failed to comply with the treatment program
20 designated for him or her.

21 “(3) The participant fails to meet any of the criteria set forth in
22 subdivision (a) or (c).

23 “(4) It is determined that the participant has not substantially benefitted
24 from participation in the program or that his or her continued participation in the program
25 creates too great a risk to the public health, safety, or welfare. Whenever an applicant is
26 denied participation in the program or a participant is terminated from the program for
27 any reason other than successful completion of the program, and it is determined that the
28 continued practice of physical therapy by that individual creates too great a risk to the

1 public health, safety, and welfare, that fact shall be reported to the executive officer of the
2 board and all documents and information pertaining to and supporting that conclusion
3 shall be provided to the executive officer. The matter may be referred for investigation
4 and disciplinary action by the board. Each physical therapist or physical therapy assistant
5 who requests participation in a diversion program shall agree to cooperate with the
6 recovery program designed for him or her. Any failure to comply with that program may
7 result in termination of participation in the program. The diversion evaluation committee
8 shall inform each participant in the program of the procedures followed in the program, of
9 the rights and responsibilities of a physical therapist or physical therapy assistant in the
10 program, and the possible results of noncompliance with the program.

11 “(c) In addition to the criteria and causes set forth in subdivision (a), the
12 board may set forth in its regulations additional criterial for admission to the program or
13 causes for termination from the program. “

14 10. Section 2669 of the Code states that participation in a diversion program
15 shall not be a defense to any disciplinary action which may be taken by the board. This section
16 does not preclude the board from commencing disciplinary action against a physical therapist or
17 physical therapist assistant who is terminated unsuccessfully from the program under this section.
18 That disciplinary action may not include as evidence any confidential information.

19 11. Section 475 of the Code states:

20 “(a) Notwithstanding any other provisions of this code, the provisions of
21 this division shall govern the denial of licenses on the grounds of:

22 “. . .

23 “(2) Conviction of a crime.

24 “. . .

25 “(4) Commission of any act which, if done by a licentiate of the business
26 or profession in question, would be grounds for suspension or revocation of license.

27 “(b) Notwithstanding any other provisions of this code, the provisions of
28 this division shall govern the suspension and revocation of licenses on grounds specified

1 in paragraphs (1) and (2) of subdivision (a) .

2 “(c) A license shall not be denied, suspended, or revoked on the grounds
3 of a lack of good moral character or any similar ground relating to an applicant's
4 character, reputation, personality, or habits.”

5 12. Section 480 of the Code states:

6 “(a) A board may deny a license regulated by this code on the grounds
7 that the applicant has one of the following:

8 “(1) Been convicted of a crime. A conviction within the meaning of this
9 section means a plea or verdict of guilty or a conviction following a plea of nolo
10 contendere. Any action which a board is permitted to take following the establishment of
11 a conviction may be taken when the time for appeal has elapsed, or the judgment of
12 conviction has been affirmed on appeal, or when an order granting probation is made
13 suspending the imposition of sentence, irrespective of a subsequent order under the
14 provisions of Section 1203.4 of the Penal Code.

15 “. . .

16 “(3) Done any act which if done by a licentiate of the business or
17 profession in question, would be grounds for suspension or revocation of license.

18 “The board may deny a license pursuant to this subdivision only if the
19 crime or act is substantially related to the qualifications, functions or duties of the
20 business or profession for which application is made.

21 “(b) Notwithstanding any other provision of this code, no person shall be
22 denied a license solely on the basis that he has been convicted of a felony if he has
23 obtained a certificate of rehabilitation under Section 4852.01 and following of the Penal
24 Code or that he has been convicted of a misdemeanor if he has met all applicable
25 requirements of the criteria of rehabilitation developed by the board to evaluate the
26 rehabilitation of a person when considering the denial of a license under subdivision (a)
27 of Section 482.

28 “(c) A board may deny a license regulated by this code on the ground that

1 the applicant knowingly made a false statement of fact required to be revealed in the
2 application for such license.”

3 13. Section 490 of the Code provides:

4 “A board may suspend or revoke a license on the ground that the licensee
5 has been convicted of a crime, if the crime is substantially related to the qualifications,
6 functions, or duties of the business or profession for which the license was issued. A
7 conviction within the meaning of this section means a plea or verdict of guilty or a
8 conviction following a plea of nolo contendere. Any action which a board is permitted to
9 take following the establishment of a conviction may be taken when the time for appeal
10 has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order
11 granting probation is made suspending the imposition of sentence, irrespective of a
12 subsequent order under the provisions of Section 1203.4 of the Penal Code.”

13 14. Section 492 of the Code provides:

14 “Notwithstanding any other provision of law, successful completion of any
15 diversion program under the Penal Code, or successful completion of an alcohol and drug
16 problem assessment program under Article 5 (commencing with section 23249.50) of
17 Chapter 12 of Division 11 of the Vehicle Code, shall not prohibit any agency established
18 under Division 2 ([Healing Arts] commencing with Section 500) of this code, or any
19 initiative act referred to in that division, from taking disciplinary action against a licensee
20 or from denying a license for professional misconduct, notwithstanding that evidence of
21 that misconduct may be recorded in a record pertaining to an arrest.

22 “This section shall not be construed to apply to any drug diversion
23 program operated by any agency established under Division 2 (commencing with Section
24 500) of this code, or any initiative act referred to in that division.”

25 15. Section 493 of the Code states:

26 “Notwithstanding any other provision of law, in a proceeding conducted
27 by a board within the department pursuant to law to deny an application for a license or to
28 suspend or revoke a license or otherwise take disciplinary action against a person who

1 holds a license, upon the ground that the applicant or the licensee has been convicted of a
2 crime substantially related to the qualifications, functions, and duties of the licensee in
3 question, the record of conviction of the crime shall be conclusive evidence of the fact
4 that the conviction occurred, but only of that fact, and the board may inquire into the
5 circumstances surrounding the commission of the crime in order to fix the degree of
6 discipline or to determine if the conviction is substantially related to the qualifications,
7 functions, and duties of the licensee in question.

8 “As used in this section, ‘license’ includes ‘certificate,’ ‘permit,’
9 ‘authority,’ and ‘registration.’”

10 16. California Code of Regulations, title 16, section 1399.20, provides:

11 “For the purposes of denial, suspension or revocation of a license,
12 pursuant to Division 1.5 (commencing with Section 475) of the code, a crime or act shall
13 be considered to be substantially related to the qualifications, functions or duties of a
14 person holding a license under the Physical Therapy Practice Act if to a substantial degree
15 it evidences present or potential unfitness of a person to perform the functions authorized
16 by the license or approval in a manner consistent with the public health, safety or welfare.
17 Such crimes or acts shall include but not be limited to the following:

18 “(a) Violating or attempting to violate, directly or indirectly, or assisting in
19 or abetting the violation of, or conspiring to violate any provision or term of the Physical
20 Therapy Practice Act.

21 “(b) Conviction of a crime involving fiscal dishonesty arising out of or in
22 connection with the practice of physical therapy.

23 “(c) Violating or attempting to violate any provision or term of the
24 Medical Practice Act.”

25 **FIRST CAUSE FOR DENIAL OF APPLICATION**

26 **(Criminal Conviction--Driving Under the Influence of Alcohol)**

27 17. Respondent's application is subject to denial under section 2660,
28 specifically, and section 480, generally, in that on or about March 30, 2001, in a criminal

1 proceeding entitled *People of the State of California v. Samuel Edward Mieske*, in Santa Barbara
2 Superior Court, Case Number 1054104, Respondent was convicted by plea of guilty to driving
3 while having a 0.08% or higher blood alcohol level, in violation of Vehicle Code section
4 23152(b), a misdemeanor and a crime substantially related to the qualifications, functions, or
5 duties of a physical therapist or physical therapy assistant. The facts and circumstances
6 underlying Respondent's conviction are as follows:

7 a. On or about February 17, 2001, Respondent drove his vehicle after
8 consuming alcoholic beverages in an amount and to the extent that his blood alcohol level
9 was 0.11%.

10 b. On or about March 30, 2001, Respondent was sentenced as
11 follows: 18 days in county jail, sentence suspended, unsupervised probation for three
12 years, complete first offender program, pay fine in the amount \$1,500.

13 **SECOND CAUSE FOR DENIAL OF APPLICATION**

14 **(Criminal Conviction--Disorderly Conduct)**

15 18. Respondent's application is subject to denial under section 2660,
16 specifically, and section 480, generally, in that on or about June 23, 2000, in a criminal
17 proceeding entitled *People of the State of California v. Samuel Edward Mieske* in Santa Barbara
18 Superior Court, Case Number 1012908, Respondent was convicted by plea of guilty to public
19 intoxication, in violation of Penal Code section 647(f), a misdemeanor and a crime substantially
20 related to the qualifications, functions, or duties of a physical therapist or physical therapy
21 assistant. The facts and circumstances underlying Respondent's conviction are as follows:

22 a. On or about May 27, 2000, at about 12:43 a.m., a Santa Barbara
23 County Deputy Sheriff attempted to issue a citation for unlawful dumping, a violation of
24 Penal Code section 374.3(a), an infraction, upon observing Respondent urinating in a
25 public park. Respondent had been drinking alcoholic beverages at a party in an amount
26 and to the extent that he was intoxicated. His clothes were soiled. He was uncooperative,
27 argumentative, and aggressive. Respondent's eyes were glassy and blood shot.
28 Respondent was unable to maintain his balance. Respondent had a strong alcohol odor

1 about him. Respondent was taken into custody and charged with public intoxication.

2 Respondent was released after spending over 12 hours in custody.

3 b. On or about June 23, 2000, Respondent was sentenced as follows:
4 one day in custody with credit for having served one day in custody, a fine in the amount
5 of \$125.00, and a booking fee in the amount of \$130.00.

6 **THIRD CAUSE FOR DENIAL OF APPLICATION**

7 **(Habitual Intemperance)**

8 19. Respondent's application is subject to denial under section 2660,
9 subdivision (f), for habitual intemperance as evidenced by Respondent having sustained multiple
10 convictions for alcohol related offenses within a nine (9) month period, as follows:

11 a. Complainant refers to and, by this reference, incorporates herein
12 paragraphs 17 and 18, above, as though fully set forth.

1 **PRAYER**

2 **WHEREFORE**, Complainant requests that a hearing be held on the matters
3 herein alleged, and that following the hearing, the Physical Therapy Board of California issue a
4 decision:

5 1. Denying the application of Samuel Mieske for a Physical Therapist
6 license or, in the alternative, issuing a probationary license with such terms and
7 conditions that will protect the public and rehabilitate Respondent;

8 2. Ordering Respondent to pay the Physical Therapy Board of
9 California the reasonable costs of the investigation, enforcement and prosecution of this
10 case and, if placed on probation, the costs of probation monitoring; and,

11 3. Taking such other and further action as deemed necessary and
12 proper.

13 DATED: March 28, 2006

14
15
16 Original Signed By:
17 STEVEN K. HARTZELL
18 Executive Officer
Physical Therapy Board of California
State of California
Complainant

19 LA2006500430

20 Mieske Statement of Issues.wpd
21
22
23
24
25
26
27
28